IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4941 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DISTRICT DEVELOPMENT OFFICER - Petitioner(s)

Versus

PURUSHOTTAM D.KAMLI - Respondent(s)

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Appearance :

MR HS MUNSHAW for Petitioner(s) : 1,
MR SUNIL C PATEL for Respondent(s) : 1,
MR AJ SHASTRI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 20/12/2005

ORAL JUDGMENT

1.**Rule.** Mr.Patel, learned Counsel for the respondent waives service of notice of Rule.

2.With the consent of both the sides, the matter is

finally heard today.

3. The short facts of the case are that the respondent who was in employment with the District Panchayat as Gram Sevak opted for voluntary retirement on 31.12.1989, however, the case of the respondent is that he was recruited on 5.10.1959 and later on he was allotted to Valsad District. At the time of retirement, the pay-scale of the respondent was 1400-40-1800-EB-50-2300. There is no dispute on the point that the respondent worked with the District Panchayat and as per the petitioner the selection grade was given to the respondent from 10.6.1988. After the retirement of the respondent, it appears that the dispute was raised by the respondent that he should have been granted benefit of the higher pay-scale as per the policy of the Government vide Resolution dated 5.7.1991 as well as Resolution dated 16.8.1994 upon completion of 9 years, 18 years and 27 years of service. Since the same was not given the respondent approached the Civil Service Tribunal by preferring an Appeal No.243 of 2000. It appears that the Tribunal found that the option was forwarded on 24.8.1992, but as per the District Panchayat, the said option was time barred and, therefore, the same could not be considered. The

Tribunal found that in view of the decision of this Court, Special Civil Application No.4977 of 1996 in case of **"Sushilaben I. Dave v. District Panchayat Bhavnagar & Ors.", reported in 2000(1)GCD, 186 (Guj.),** even if there is a delay, such an option cannot be ignored and the authority is required to consider the same on merits. The Tribunal thereafter by relying upon the decision of this Court has allowed the appeal and has set aside the order of the authority declining the higher pay-scale and further directed for conferring the higher pay-scale to the respondent as per the judgement dated 12.5.2003 and under the circumstances, the petitioner DDO has approached this Court by preferring the present petition.

4. Heard Mr.Munshaw, learned Counsel with Mr.Barot for the petitioner and Mr.Patel for respondent.

5. It has been submitted on behalf of the petitioner that the Tribunal has no jurisdiction for conferring in a matter of higher pay-scale which is not granted in view of the decision dated 27.8.2004 of this Court (Coram: Miss R.M. Doshit, J.) in case of **"State of Gujarat v. B.L. Trivedi and Anr.", in SCA No.1852 of 2004** and, therefore, it has been submitted that the order is without jurisdiction.

6.Mr.Patel, learned Counsel appearing for the respondent on the other hand, submitted that as such the question of jurisdiction was not raised before the Tribunal by the petitioner herein and, in any case, the Tribunal has relied upon the decision of this Court in case of **"Sushilaben I. Dave v. District Panchayat Bhavnagar & Ors." (supra)** and, therefore, the order of the Tribunal cannot be said as illegal.

7.Having considered the above, it appears that it is true that the point of jurisdiction was not raised by the petitioner before the Tribunal and if it is a error for interpretation in question of law, this Court while exercising power under Article 227 of the Constitution of India may not entertain the contention raised for the first time before this Court, which is not raised before the lower Authority. However, if the question goes to the root of the jurisdiction of the Tribunal and if the order is ex-facie without jurisdiction, such aspect can be considered by the Court while exercising power under Article 227 of the Constitution of India. The decision of the Coordinate Bench of this Court dated 27.8.2004 in case of "State of Gujarat" (Supra) in SCA No.1852 of 2004 does show that this Court has found that the subject of grant of higher pay-scale is

outside the jurisdiction of the Civil Service Tribunal and, therefore, in that matter, the Court quashed the judgement of the Tribunal and, therefore, when the Tribunal had no jurisdiction in view of the aforesaid decision of this Court, it can be said that the order passed by the Tribunal is without jurisdiction and if such is the situation, petitioner can be allowed to raise such a contention and the same can be considered by this Court while exercising power under Article 227 of the Constitution of India. The matter does not rest there but the additional circumstances, which deserve to be recorded is that the Tribunal, after taking into consideration the decision of this Court in case of **"Sushilaben I. Dave v. District Panchayat Bhavnagar & Ors."**(supra) that the delay in submitting the option is not a valid ground for rejection of the request for higher pay-scale, it ought to have directed the authority to consider the matter on merits for entitlement of the respondent employee for higher pay-scale. Merely because the delay is not to be considered, the same itself is not sufficient to confer the benefits in favour of the employee for getting higher pay-scale, but the other aspects will have to be examined by the authority as to whether the employee is

entitle to higher pay-scale, even if such option is treated as well within the time. Therefore, the aforesaid is an additional error which is, in the opinion of the Court, ex-facie committed by the Tribunal while passing the final order in the appeal preferred by the respondent.

8. It is true that in normal circumstances, if the Tribunal has exercised the power without jurisdiction the consequence would be to quash and set aside the judgement and order of the Tribunal. However, the decision of the Tribunal for setting aside the action of rejecting the proposal of the petitioner therein on the ground of delay is based on the decision of this Court in case of **"Sushilaben I. Dave v. District Panchayat Bhavnagar & Ors."**(supra). Therefore, on merits, to that extent, it can be said that the petitioner therein before the Tribunal had a good case which this Court may be required to consider while giving final direction even if it is found that the Tribunal had exercised the power without jurisdiction. The peculiar circumstances in the present case is that the respondent employee has retired long back and when on the question of limitation for giving option this Court has already ruled in case of **"Sushilaben I. Dave**

v. District Panchayat Bhavnagar & Ors.” (supra), if appropriate direction is not given even while disposing the matter, the employee will be again required to ventilate his grievance by a substantive proceedings before this Court and, in any case, even if such delay is ignored, it would be required for the DDO to examine the matter for entitlement of the respondent employee for higher pay-scale or otherwise on merits. As the said exercise is yet not undertaken, I find that since on factual aspects for the length of service there is no dispute, the appropriate directions deserve to be given to the DDO for considering the matter for grant of higher pay-scale or otherwise, excluding the aspects of delay in submitting the option. The aforesaid, in the opinion of the Court, appears to be appropriate for ends of justice.

9. In view of the above, the impugned order of the Tribunal dated 12.5.2003 in Appeal No.243 of 2000 is quashed and set aside with the further directions that the option submitted by the petitioner for receiving higher pay-scale shall not be treated as time barred by DDO and it is also directed that the DDO shall consider the option as within time limit and, thereafter shall examine the matter for entitlement or otherwise of the

respondent for higher pay-scale and appropriate decision shall be rendered within a period of three months from the date of receipt of the order of this Court.

10. The petition is allowed to the aforesaid extent. Considering the facts and circumstances, there shall be no order as to costs. Rule made absolute accordingly.

20.12.2005 **(Jayant Patel, J.)**

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